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adv 2'56 #1

(145)

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

(56 I.A.2 145)

General No. 10579 Agenda No. 2

Mitchell J. Alster, Plaintiff-Appellant vs. Illinois Society of Professional Engineers, Inc., Chester Cole, Defendants-Appellees	)	Appeal from Circuit Court Sangamon County

TRAPP, J.

Appearing pro se, plaintiff appeals from the order of the trial court dismissing his third amended complaint for failure to state a cause of action. This complaint appears to have been drafted by a firm of lawyers, but having filed it in the trial court, they did not, thereafter, appear in the record.

Count I of this complaint undertakes to allege a cause of action for libel through an article printed in a magazine known as the "Illinois Engineer", published by the defendant, Illinois Society of Professional Engineers, which is described as a corporation organized under the laws of the State of Illinois. It is alleged that the plaintiff is a duly registered and licensed professional and structural engineer under the laws of

the State of Illinois.

The article in question, attached as an exhibit to the complaint, is as follows:

" VILLAGE DISMISSES QUACK
ENGINEERING FIRM

The Village of Lisle, a suburb of Chicago, has dismissed the Thomas O. Miles, Jr., engineering firm from a proposed $2,000,000 sewer and water main project after the village learned that Miles was not registered in the State. In fact, they found that he is not registered in any state.

The I.S.P.E., the Chicago, and the Salt Creek Chapters received a great deal of publicity in the west suburban papers and the Chicago Tribune for the part they played in bringing this case to light.

The Miles firm prepared a preliminary report to the Village of Lisle for which they were paid $2500. Complaints about the quality of this report by the village and a complaint by an I.S.P.E. member to the Chicago Chapter about the man being unregistered, triggered the investigation. Since the Miles office and the Village of Lisle are in the Salt Creek area, the Ethics and Practice Committees of both chapters worked together in gathering evidence. On May 2, 1960, an informal hearing was held in the office of the Department of Registration and Education. By this time, Mr. Miles had incorporated his firm to do structural engineering work by bringing in Mitchell J. Alster, S. E., as an officer of the firm. Mr. Leo Lowitz, supervisor of complaints for the Department, informed Mr. Miles that he still was not properly incorporated to do professional engineering work. He further told him that he had been practicing illegally for over a year and that the contract with the Village of Lisle was illegal and that the village could probably recover their money if it was taken to court.

Many statements made by Miles at the hearing were proven false by the evidence gathered by the I.S.P.E. representatives. Mr. Miles claimed that no design work had been performed in preparing the preliminary report to the village. Upon questioning by

the Chicago Chapter representatives, however, Mr. Miles admitted that plans were prepared and attached to the report indicating the proposed routing and sizing of the sewers and mains. The plans had been removed from the report submitted to the Department.

Mr. Miles stated during the hearing that he had never claimed to be a registered professional engineer. Upon questioning by Louis A. Bacon, chairman of Chicago Ethics and Practice Committee, Mr. Miles admitted that his firm's brochures state he is a registered professional engineer in the State of New Jersey. However, he stated that this registration had been dropped in 1953. Mr. Bacon then produced a typewritten resume, dated July 28, 1959, of the Miles firm which had been sent to the Village of Downers Grove. This document still listed Miles as registered in the State of New Jersey.

The Chicago Tribune article states that Leonard Bosgraf, Village Attorney for Lisle, said that the Village would attempt to recover the $2500 paid Miles for the preliminary report. He further stated that a court suit would be instituted if necessary.

The Tribune article also quotes Chester Cole, chairman of the Salt Creek Chapter Ethics and Practice Committee, as saying 'This constitutes "quackery".' The article then states that the reporter reached Miles in his LaGrange office and he laughed when he was told the Illinois Society had labeled him a 'quack'. 'I was not operating illegally in any way,' he asserted.

Mr. Cole further indicated that the two Chapters intend to file complaints against Miles. The counsel for the two Committees, Howard DePree, is quoted as saying that Miles would be charged with practicing and offering to practice engineering while unregistered.

The various resumes and brochures put out by Mr. Miles have all listed him as a graduate of the University of Tennessee with a B.S.C.E. About two weeks after the informal hearing, the Chicago Chapter received proof that the University of Tennessee has no record of Mr. Miles ever being registered in any course of study.

The two Ethics and Practice Committees are now in the process of filing criminal proceedings against this man. The Illinois Engineer will keep the membership appraised of the progress and outcome of this case which appears to be a very flagrant violation of our engineering registration Acts."

(Certain underlining and other annotations appearing upon the Exhibit are not set forth above).

As to this Count, the opinion of the Supreme Court, John v Tribune Company, 24 Ill. 2d 437, controls our consideration of this issue. That opinion establishes the current rules concerning the law of libel in this State in holding that it is for the trial court to determine from the pleading, including the published article, whether (1) the language is susceptible of the construction claimed by the plaintiff, and (2) whether the publication "concerns" the plaintiff as the "target" of the allegedly libelous language. This opinion further clarifies the rule in this State that words capable of being read innocently must be so read, and declared non-actionable at law. Our question, therefore, is, did the trial court, within the scope of such rules, abuse its discretion in holding that the plaintiff failed to state a cause of action for libel?

Plaintiff's allegation, in which he sees himself as the "target" of the publication, is in the language:

> " The said article in question mentions the plaintiff, Mitchell J. Alster, as an officer of the firm and by this article then it was meant that plaintiff, as an officer of the firm, was also engaged in quackery. The article is so understood by the readers of the magazine."

It appears, however, from the tenor of the article that the "Thomas O. Miles, Jr. Engineering Firm" had had a contract with the Village of Lisle; that it had made reports of this work for which it had been paid the sum of $2500; that there were complaints concerning the

quality of the work; that it had been ascertained that Mr. Miles was not a registered engineer; that evidence upon these matters had been gathered and a hearing by the Department of Registration and Education was held on May 2, 1960. The only reference in the article to the plaintiff immediately follows:

> " By this time, Mr. Miles had incorporated his firm to do structural engineering work by bringing in Mitchell J. Alster, S. E., as an officer of the firm."

The article, to this point, clearly concerns transactions and conduct of Mr. Miles prior to "bringing in" the plaintiff.

While the trial court possibly did not have the benefit of the information, plaintiff's statement of facts discloses that at the time of plaintiff's employment by Mr. Miles, plaintiff was advised that Mr. Miles was not licensed and that he needed a licensed engineer to take over a practice of civil engineering; that the plaintiff advised Mr. Miles that the Miles firm must become incorporated and employ the plaintiff as "chief executive officer" in order to comply with the registrations laws, and that a contract between them was drawn and the business was incorporated. His statement of facts continues with the following:

> " It developed that at that very time, without warning, Mr. Miles was being investigated for malpractice by the Society, and a hearing was ordered by the Department of Registration and Education of the State."

Thus, plaintiff concedes that at the time of the employment in question, he knew that Mr. Miles was doing engineering work, although

not qualified, at least in terms of license and registration, and that the plaintiff advised and assisted in the steps to incorporate and to qualify to do such work.

In determining the "target" of the article, it is noted that the report refers to false statements by Mr. Miles at the hearing of the Department of Registration and Education, concerning whether or not Mr. Miles was a registered engineer, or had an engineering degree, and there are set out expressions of opinion as to whether or not the fee paid to Mr. Miles for engineering services might be recovered and as to whether or not the work theretofore done by Mr. Miles constituted a violation of the engineering registraction acts.

Plaintiff's own brief points out that the article does not state that he, plaintiff, is a "quack", but that by the use of his name he is associated with "quackery" and that such association reflects upon his integrity. He further contends that after he became associated with the firm, it ceased to be "quack" under his interpretation of the several engineering acts.

In Lundstrom v Winnebago Newspapers, Inc., 27 Ill. App. 2d 128, plaintiff brought an action for libel by reason of an article, amidst other language, including the following:

> " The issuance by the former mayor of a city liquor license after $7,000 had changed hands will remain fresh in the minds of Rockford folk for a long time,"

Plaintiff in that case argues that the sentence was libelous per se in that it carried " an imputation of lack of integrity" against the plaintiff. Pointing out that the words used did not charge bribery or complicity in accepting a bribe, the court held that the words were not reasonably and fairly susceptible of the meaning ascribed to them by the plaintiff, and that the trial court did not err in ordering dismissal of the complaint.

In this case, therefore, we believe that the trial court was justified in concluding that the plaintiff Alster was not the "target" of the article in issue, and that the language complained of is not reasonably susceptible of the construction urged by the plaintiff. It can fairly be said that the article is directed to the alleged conduct of Miles and to the "firm" existing prior to the time of plaintiff's employment.

Count II of the complaint is described by the plaintiff as an action for damages for breach of contract. It is alleged that the plaintiff paid a membership fee and became a member in good standing of the Illinois Society of Professional Engineers and its Chicago Chapter, but that in violation of the Charter, Constitution and By-Laws, the defendants "did wrongfully cause to, or in consequence of their acts cause plaintiff to be deprived of his membership in said Society....." Plaintiff's reply brief points out that he is not seeking to regain his membership but only damages for breach of contract.

The complaint does no more than mention the Society's Charter, Constitution and By-Laws. The terms, language or contents of these documents are not set out in the pleadings, nor are copies attached as exhibits. Hence, the trial court had no means of ascertaining the rights, privileges and duties of the parties arising under the membership alleged.

There are no allegations of fact which disclose how, when or by what means the plaintiff was deprived of his membership in the Society, and there are no facts alleged which would enable the court to determine what acts, if any, could be said to be in violation of the Charter, Constitution or By-Laws. There is only the plaintiff's conclusion that he was wrongfully deprived of his membership.

Plaintiff's concept of pleading is revealed by his argument that where his membership is alleged to be terminated "wrongfully", defendants must show just cause for termination. No authority is cited.

We believe that the trial court properly concluded that the allegations of Count II of the complaint failed to meet the requirements of Section 33 of the Civil Practice Act providing that there shall be a plain and concise statement of the cause of action. Deasey v City of Chicago, 412 Ill. 151. The allegations of Count II may be described as "argumentative" in the sense that the Count does not state matters of fact but leaves them to be collected from inference and argument only. Church v Adler, 350 Ill. App. 471.

The judgment of the trial court is affirmed.

SMITH, P. J. and CRAVEN, J. concur.

Adv V 56 #1

(145)

No. 64-87

(56 I.A.2 145)

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OSCAR PATRICK, Plaintiff-Appellant,	)	
vs.	)	Appeal from the Circuit Court of Kane County.
BURGESS NORTON MANUFACTURING COMPANY, a Corporation, Defendant-Appellee.	)	

MR. JUSTICE MORAN delivered the opinion of the court:

On September 29, 1959, the plaintiff was injured while working. Within apt time a suit was brought under the Illinois Structural Work Act in the Circuit Court of Kane County and given general number 59-1781. On March 15, 1963, this suit was dismissed for want of prosecution without notice being given to the plaintiff by the Clerk of the Court. The plaintiff alleges that he first knew of the dismissal upon receipt of a letter from defendant's counsel dated March 14, 1964. On March 16, 1964, a Monday, plaintiff re-filed his action in the same Court and was given general number 64-555. This same day the defendant filed a motion to dismiss case number 64-555 upon the grounds that the case was not filed within one year in accordance with Ch. 83, Sec. 24(a), Ill. Rev. Stat. (1961) and was not reinstated within 90 days as provided by

Stat. (1961) and was not reinstated

Administrative rule of the Circuit Court of Kane County. The Court allowed the motion and dismissed the suit. Within term time the plaintiff filed a motion to vacate the dismissal order and this was denied. It is because of this denial that the plaintiff is before this Court.

The primary question urged by the plaintiff in this appeal is whether or not case number 64-555 was filed in compliance with Ill. Rev. Stat. Ch 83, Sec. 24(a) (1961), which provides, in part, as follows:

> ". . . If the plaintiff has heretofore been nonsuited or shall be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff . . . may commence a new action within one year after such judgment . . . given against the plaintiff, and not after."

The term "nonsuit" as used in the above cited statute includes a dismissal for want of prosecution. Spring Valley Coal Co. v Patting, 112 Ill. App. 4, aff'd 201 Ill. 342; Swiontek v Greenstein, 33 Ill. App. 2d 355; Sachs v Ohio National Life Ins. Co., 131 F. 2d 134 (CCA 7th). The defendant has not argued to the contrary.

The plaintiff assumes that the time limitation for bringing an action for injuries under the Scaffold Act is two years and the defendant has not argued to the contrary. Therefore, the time limited for bringing the action expired during the pendency of the original suit.

The main difference between the parties is basically one of computation of time. Did the plaintiff commence case number 64-555 within one year after his original case was dismissed for want of prosecution? Plaintiff says he did, and defendant says he did not. We feel he did. As a basis for this conclusion we rely upon an act of the

Legislature which was adopted on March 5, 1874, two years after the above cited section. This is Chapter 131, Sec. 1.11, Ill. Rev. Stat. (1961), and states as follows:

> "The time within which any Act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is Sunday or is a holiday as defined or fixed in any statute now or hereafter in force in this State, and then it shall also be excluded. If the day succeeding such Sunday or holiday is also a holiday or a Sunday then such succeeding day shall also be excluded."

The defendant cites numerous cases concerning the rules of statutory construction, but we think the applicable ones support our conclusion. The courts should give effect to legislative intent by considering the reason or necessity for the enactment, contemporaneous conditions, existing circumstances, and the objects sought to be obtained by the legislation. Also, when statutes are in pari materia they should be construed together, even though they were enacted at different times. Southmoor Bank and Trust Company v Willis, 15 Ill. 2d 388. We see no conflict between the two cited enactments.

Defendant further contends, based upon the case of Irving v Irving, 209 Ill. App. 318, that "in computing time by the calendar year . . . the calendar is examined and the day numerically corresponding to that day in the following year is ascertained, and the calendar year expires on that day, less one." The Court in the Irving case qualified its opinion when it stated "The statutory provision for 'excluding the first day and including the last' is for computation when 'the time within which any act provided by law is to be done' which language is not applicable to the divorce statute referred to." However, in Price v Illinois Bell Tel. Co., 269 Ill. App. 581, the same court distinguished the Irving case and held that, in determining whether or not actions for damages for an injury to the person have been commenced within two years, Chapter 131, Sec. 1.11 applies to the computation of time. See also O'Rourke v Prudential Ins. Co.,

Legislature which was adopted on March 2, 1874, two years after the above cited section. This is Chapter [illegible], Sec. 1.11, Ill. Rev. Stat. (1961), and states as follows:

> The time within which any act provided by law is to be done shall be computed by excluding the first and including the last, unless the last day is Saturday or Sunday or a holiday as defined or fixed in any statute now in force [illegible]

The [illegible] statutory [illegible] conclusion. The courts should give effect to [illegible] considering the [illegible] conditions, existing circumstances, and the [illegible] by the legislature. [illegible] construed together, [illegible]

Southern [illegible] conflict between the two cited [illegible].

Defendant [illegible] 279 Ill. [illegible] is excluded [illegible] that day in the following [illegible] less one. The [illegible] Irving case [illegible] it stated. The statutory provision for excluding the first day and including the last is for computation of [illegible] within which any act provided by law is to be done [illegible] refered to. [illegible] in [illegible] v Illinois [illegible] App. [illegible], the same court distinguished the Irving case and held that, in determining whether or not actions for damages for [illegible] have been commenced within two years, Chapter 1 [illegible], Sec. 1.11 applies to the computation of time. See also O'Rourke v Prudential Ins. [illegible]

294 Ill. App. 30; In re Reemts Estate, 383 Ill. 447; People v Hannon, 381 Ill. 206; Sarro v Illinois Mutual Fire Ins. Co., 34 Ill. App. 2d 270; Chung v Blue Island Oil Products Co., 336 Ill. 439. Based upon the cases cited we are of the opinion that Ill. Rev. Stat. Ch. 131, Sec. 1.11 (1961), is applicable to the case before us. Therefore, by excluding the first day and including the last day we arrive at March 15, 1964. Since this was a Sunday and is to be excluded, we find the last day for filing of case number 64-553 was March 16, 1964. This was done, and it was done "within one year' after the original case was dismissed for want of prosecution, which was in compliance with Ill. Rev. Stat. Ch. 83, Sec. 24(a) (1961).

Consequently, the order appealed from is reversed with directions to reinstate the cause for trial on the merits. Having reached this conclusion there is no need to pass upon appellant's other assignments of error.

REVERSED and REMANDED
WITH DIRECTIONS.

ABRAHAMSON, P. J. and DAVIS, J., concur.

Adv 1/56 #1

(152)

A

Abstract

No. 64-74

(56 I.A.2152)

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS EX REL DOROTHY M. HYNDE, Plaintiffs-Appellees,	)	
vs.	)	Appeal from the Circuit Court of DeKalb County.
DANIEL HOPPER, Defendant-Appellant.	)	

MR. JUSTICE MORAN delivered the opinion of the court:

On March 14, 1961, a petition under the paternity act was filed in the County Court of DeKalb County, naming the appellant, Daniel Hopper, the respondent and father of a female child born November 17, 1959. On April 7, 1961 a hearing was had on the petition and the appellant was present with his attorney. During the hearing the appellant acknowledged that he was the father and the court ordered him to pay $15.00 a week for support and toward the medical expenses incurred.

On May 8, 1962, a petition for a rule to show cause was filed, alleging that the appellant had made no payments as ordered by the court. Neither the appellant nor his attorney was given notice of the filing of the

No. 6+74

petition. The same day the court entered an order holding the appellant in contempt of court, ordering the sheriff to serve a copy of the order on him, and adding in ink "Defendant to show cause on or before May 22, 1961."

On the date set, the court, after finding that the sheriff was unable to locate the appellant so that a copy of the May 8, 1962 order could be served upon him, ordered a warrant to issue for his arrest. It was not until May 15, 1964, that the appellant was found and brought before the court. An order was then entered finding the appellant to be in contempt for failure to pay support and he was sentenced to the Illinois State Farm at Vandalia, Illinois, for a term of ninety days. On May 19, 1964, motions to vacate the order of May 15, 1964, and to quash the warrant were filed. After a partial hearing the cause was continued to May 25, 1964, at which time the motions were denied.

The following day a notice of appeal and a supersedeas bond were filed and the appellant was discharged from custody pending his appeal.

This Court on September 23, 1964, dismissed the appeal for failure of the appellant to file his abstract and brief in accordance with our Rule 9. As is later shown by pleadings filed in this court, on October 30, 1964, the appellant was again brought before the trial court and the order of May 15, 1964, was reinstated against him because the appeal was dismissed.

Thereafter, on motion of the appellant, the appeal was reinstated by this court. The appellee did not file a brief and eventually the Clerk of this Court noted the cause for oral argument on the February, 1965

petition. The same day the court entered an order holding the appellant in contempt of court, ordering the sheriff to serve a copy of the order upon him, and adding in rule 1 Defendant to show cause on or before [illegible] 1961.

On the date set, the court, after hearing [illegible] was unable to locate the appellant so that a copy of the [illegible] could be served upon him, ordered a warrant to issue [illegible] was not until May [illegible], 1964, that the appellant was [illegible] before the court. After [illegible] contempt for failure to pay support and be [illegible] State Farm at Virginia, Illinois, [illegible] 1964, motions to vacate the order of [illegible] warrant were filed. [illegible] May 25, 1964, at which time the motions were denied.

The following day a notice of appeal [illegible] were filed and the appellate was directed [illegible] appeal.

This [illegible] failure of the appellee to file his abstract and brief [illegible] rule 9. [illegible] October 30, 1964, the appellant was again [illegible] court and the order of May 15, 1964 was [illegible] because the appeal was dismissed.

Thereafter, on motion of the appellant, the [illegible] by this court. The appellee did not file a brief and [illegible] of this Court noted the cause for oral argument on the February [illegible] 1965.

docket call. However, on February 16, 1965, the appellee filed a motion, supported by affidavit, to dismiss the appeal. The appellee filed written objections to this motion on February 19, 1965. Both parties failed to appear and argue on the date set and we have taken the pending motion with the case.

Appellee's motion sets forth that on November 4, 1964, the appellant paid the sum of $500.00 to the relator, Dorothy M. Hynde, which represented all of the past due support money owing to the date of its receipt. Further, that as a result of this payment the appellant has purged himself of the contempt; that the sheriff released him immediately; and that the trial court had agreed on that day to enter an order vacating the contempt order upon its being presented. The appellant admits this in his written objections, but states that he is still entitled to a decision from this Court, so that, if he is successful, he will have a right of action for damages because of his imprisonment under the contempt order. The appellee asserts that the question before this Court is now moot.

A question is said to be moot when it presents or involves no actual controversy, interests or rights of the parties or when the issues have ceased to exist. Gribben v Interstate Motor Freight System Co., 18 Ill. App. 2d 96. In this case, when the appellant paid the arrearage, he purged himself of contempt. As was stated in Eastman v Dole, 213 Ill. App. 364, 368, "In this class of cases the party litigant alone, in whose interest the order has been entered, is interested in its enforcement and, the moment he is satisfied, the contempt proceedings are at an end." The Court in the same case went on to say, "The existence of an actual controversy is an essential requisite to an appellate jurisdiction, and a reviewing court will dismiss an appeal or writ of error where facts are disclosed which show that a controversy does not exist, even though such facts do not appear in the record (cases cited)." (213 Ill. App. at 370)

For the reasons stated, the appeal herein is dismissed.

ABRAHAMSON, P. J., and DAVIS, J. concur.

docket call. However, on February 16, 1962, the appellee filed a motion, supported by affidavit, to dismiss the appeal. The appellant filed written objections to this motion on February 19, 1962. Both parties failed to appear and argue on the date set for the hearing on the motion with the result

Appellee's motion set forth [illegible] the appellant pale the [illegible] the record [illegible] was [illegible] to the date [illegible] Further, [illegible] engaged himself of the [illegible] that the trial court had agreed [illegible] the contempt order upon its being [illegible] in his written objection [illegible] from this Court," to this [illegible] for damages because of his [illegible] appeal [illegible]

A question is said to be moot when it presents [illegible] controversy. Interests or rights [illegible] to exist. [illegible] 6C. In this case, when the appellant had [illegible] of course so. As was stated in [illegible] "In this class of cases the party litigant alone, in whose interest it is [illegible] has been entered, is interested in its continuance and, the moment he is satisfied, the contempt proceedings are at an end." The Court in the same case went on to say, "The existence of an actual controversy is an essential requisite to an appellate jurisdiction and a reviewing court will dismiss an appeal or writ of error where facts are disclosed which show that a controversy does not exist, even though such facts do not appear in the record (cases cited)." (213 Ill. App. at 370)

For the reasons stated, the appeal herein is dismissed.

ABRAHAMSON, P. J., and DAVIS, J., concur.

56 I.A.2 153

A R

as per letter Ap. 21

49716

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE CIRCUIT COURT
	)	
Plaintiff-Appellee,	)	OF COOK COUNTY, COUNTY
v.	)	DEPARTMENT, CRIMINAL
DAVID ERNEST FORD,	)	
	)	DIVISION
Defendant-Appellant.	)	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of conviction of defendant for involuntary manslaughter and a sentence of from five to ten years in the penitentiary. The case was tried by the court without a jury.

Defendant was indicted in Count I for murder, in Count II for voluntary manslaughter and in Count III for involuntary manslaughter. Defendant was acquitted on both Counts I and II. Count III, charging defendant with involuntary manslaughter, stated that:

> . . .he, acting in a reckless manner, struck and killed Catherine Kendall otherwise called Catherine Ford otherwise called Catherine Green with an instrument (which said instrument is unknown to said grand jurors), without lawful justification, . . .

Defendant was convicted on this count, sentenced, and this appeal followed.

Catherine Kendall was found dead on Thursday, September 5, 1963, by Lois Licato, the landlady, in the bedroom of apartment 314 at 900 North LaSalle Street, Chicago. The coroner's physician gave the cause of death as cranio cerebral injury and stated, "cause of death was brain damage itself." She died, according to the coroner's physician, "36 to 48 hours dating back from three o'clock on September 5, 1963." Thus Catherine Kendall died between 3:00 P.M. the afternoon of September 3rd and 3:00 A.M. September 4th. Defendant lived with Catherine Kendall (nee Green, nee Ford) and her infant daughter in apartment 314 (it appeared to be a common-law relationship of some few weeks duration).

On the evening of Friday, August 30, 1963, defendant met Helen Johnson, at the YMCA on South Wabash Avenue. They began drinking and went to defendant's apartment. At the apartment were the deceased, Catherine Kendall, and her baby. Helen Johnson stayed Friday night, Saturday, Sunday and finally left at 1:00 A.M. Monday morning, September 2nd, to return to her home on the South Side. She testified that during this three day period defendant was continuously drinking. She further testified that on Saturday, defendant, without warning or provocation, walked in and knocked a skillet off the stove and that on Sunday, again without warning or provocation, he put his fist through a window. She stated that when she left the apartment on Monday, September 2nd, at 1:00 A.M., Catherine Kendall was alive.

Manuel Hernandez testified for the State that on September 3, 1963, he lived in apartment 312 in the same building and while visiting his cousin in apartment 313 on September 3, 1963, he heard a noise, opened the door, and saw defendant in the corridor. Defendant asked him for a match. When a lady opened the door of 314, defendant hit her, went inside and closed the door. He did not see defendant any more but heard noises which sounded like a fight. As Hernandez went back into his room (312), he heard sounds like the lady being struck, heard fighting and heard her say "leave me alone." All this came from room 314. After that, he went to sleep. Defendant gave two statements to the police in which he admitted that on September 2, 1963, he slapped or "smacked" the deceased, but stressed the point that he did not hit her at any time with anything in his hand.

Lois Licato, the landlady, testified that on September 3rd defendant came to her apartment and told her he had broken a window. Nothing else was said. She did not go to his apartment and had not been to his apartment at any time the past three and one half weeks. She

stated that when she saw mail piling up for two days, she went to apartment 314 on September 5, 1963, opened the door, and "saw the place was all upset." She further stated, "I went into the kitchen and I saw broken glass and blood all over everything. I walked into the bedroom and discovered the body of Mrs. Catherine Ford."

Officers McIntyre, Bickler and Oddo testified, but none of their testimony directly implicated defendant.

Two statements taken from defendant and admitted in evidence, without objection, described defendant's meeting Helen Johnson; drinking with her; taking her to his apartment, with the consent of the deceased; the fact that she stayed overnight on Saturday and Sunday; his continued drinking, while leaving and returning to the apartment at various times and, on September 2nd, of having a little argument with "Katie" and "smacking" her. They further described, his waking up behind the Worthington Hotel, where he had slept all Monday night; the fact that he returned to the apartment at noon, and discovered Catherine was not there; that he waited a while, dressed the baby and took her with him; that he never saw Catherine on September 3, 1963; and that he visited a few saloons, finally leaving the baby with a woman in one of the saloons. (The baby eventually turned up when the aforesaid woman delivered her to St. Vincent's Orphanage).

Defendant's appeal is based on four contentions: first, that the State failed to prove beyond a reasonable doubt the corpus delicti of the offense charged; second, that the State failed to prove beyond a reasonable doubt defendant caused the death of the deceased; third, that the State failed to prove beyond a reasonable doubt the act of defendant was unlawful; and fourth, that the State failed to prove beyond a reasonable doubt defendant acted recklessly.

[1,2] The offense charged is found in Ill. Rev. Stat. 1963, Chap. 38, Par. 9-3(a) and reads as follows:

-4-

> A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly.

Thus, the necessary elements which must be proved by the State to convict an individual of the offense of involuntary manslaughter are: (1) the death of a human being; (2) criminally caused by the act of another; (3) said other person is proved to be the person accused of the offense; (4) the act, whether lawful or unlawful, which causes the death, is likely to cause death or great bodily harm to some individual and (5) the act is performed recklessly. The first two elements comprise the corpus delicti of the offense.

[3-5] The corpus delicti in a criminal homicide consists of the fact of death caused by the criminal agency of another. People v. Sloss, 412 Ill. 61, (1952); People v. Melquist, 26 Ill.2d 22, (1962). The State must prove beyond a reasonable doubt that a person was killed by someone and that the killing was criminally performed. People v. Benson, 19 Ill.2d 50, (1960); People v. Manske, 399 Ill. 176, (1948). This may be proved by circumstantial as well as by direct evidence. People v. Tobin, 369 Ill. 73, (1938).

[6] Defendant's first contention is that the corpus delicti was not proved by the State. He contends that there was no evidence that the person named in the indictment was killed and further that there was no evidence submitted by the State which showed that the killing was caused by a criminal agency. This contention is invalid. Lois Licato testified she discovered the body of Catherine Ford. Dr. Wagner, the pathologist, testified he examined the body and took a Polaroid photograph of it. Officer Bickler testified that the body was removed from apartment 314, 900 North LaSalle Street, and further testified that the photograph of the body was the same body he saw at apartment

314 and the County Morgue. Thus, there was sufficient evidence produced that the person named in the indictment was killed. There was also sufficient evidence submitted by the State to prove that the death of the person named in the indictment was killed by a criminal agency. Dr. Wagner testified that the death was caused by brain damage, which in turn was caused by skull fractures and hemorrhaging. He described the body as having broken ribs, cuts and bruises on the head as well as the neck, trunk and extremities. The only inference that can be drawn from the doctor's objective findings is that the deceased was subjected to a vicious beating during which the skull fractures occurred. Furthermore, Lois Licato, who found the body, stated that the apartment was blood spattered and there was broken glass present. Officer McIntyre also described the blood spattered condition of the apartment. The State proved that the person named in the indictment was killed and that the killing was caused by a criminal agency. We conclude that the State proved the corpus delicti of the offense beyond a reasonable doubt.

Defendant next contends that he was not the criminal agency which caused the death of the deceased. He first alleges he was not present at the time deceased met her death. The time of deceased's death was fixed at sometime between 3:00 P.M on the 3rd and 3:00 A.M. on the 4th of September, 1963. Defendant admitted being present in the apartment, where the body was subsequently found, beginning at noon on September 3, 1963, and continuing for an undetermined length of time that same day. His landlady testified that she spoke to him at her apartment in this same building, where defendant lived, on September 3, 1963. Manuel Hernandez, a tenant in apartment 312, testified that he spoke to and saw defendant on September 3, 1963; saw defendant strike the deceased on that date; saw the defendant enter the apartment with

deceased; heard the defendant and a lady in a fight and also heard a lady cry out, "leave me alone." This testimony and defendant's admission, definitely places him at the scene of the crime during the critical hours when death occurred. The only reference that any other person was present was defendant's statement that when he returned to the apartment around noon on September 3, 1963, he did not have his key and requested the landlady to send someone with him to open the door. He stated that the landlady sent a man with him, who opened the door of the apartment, stepped inside and then left. The landlady vehemently denied that defendant asked for assistance in this regard; denied that she sent anyone to his apartment on September 3, 1963, or on any other day; and denied that she ever visited defendant's apartment any time prior to September 5, 1963, when she found the body. Therefore, the only person in the apartment with the deceased during the time when death occurred, was defendant.

Defendant also contends that his acts were not the criminal agency that caused the death of the deceased. Helen Johnson testified concerning the events that occurred during the three days prior to the death, most of which testimony was confirmed by defendant in his statements. She told of almost continuous drinking on the part of defendant and related that she observed two unprovoked outbursts of defendant during these three days. She told of his knocking a skillet from the stove on Saturday night and of putting his fist through a window of the apartment on Sunday night, both acts without provocation. Such testimony cannot be equated with a mild mannered or even tempered man, but rather with a person who loses his temper easily when drinking. Defendant admits "smacking" the deceased at least twice. Whether or not he struck the deceased on Monday, September 2, 1963, is not the point stressed. What is of paramount importance is that he

acknowledged his capability and propensity for vicious conduct when drinking.

The question resolves itself into a determination of what inferences can be gleaned from the facts described above. We are aware that "a crime is never presumed where the conditions may be explained on an innocent hypothesis." People v. Benson, 19 Ill.2d 50 (1961) at page 61. We find, however, no innocent hypothesis here. From the testimony of Manuel Hernandez, who saw the striking, Lois Licato, the landlady, who found the body and broken glass, and the testimony of Dr. Wagner, who gave the cause of death as cranio cerebral injury, there was ample proof that the deceased was struck by defendant; that the deceased was killed; and that defendant was in the vicinity at the time of the killing. Furthermore, the State has negated the presence of anyone else at the scene at or about the time of death. Only one inference is left. The defendant killed the deceased. No inference of innocence is left in the face of this evidence. As was said in People v. Galloway, 28 Ill.2d 355 (1963), the findings of the trier of facts will not be disturbed on review unless the evidence is so palpably contrary to the verdict as to create a reasonable doubt as to guilt.

Defendant next contends that the State did not prove that he acted unlawfully, and if it did, that he should have been found guilty of murder and not involuntary manslaughter. His contention rests on the words of the trial judge, who remarked, ". . .and I think he was so drunk he hardly knew what he was doing. That is why the finding is only involuntary manslaughter. It was reckless. . . ." Defendant has construed the word "it" to mean that defendant's unlawful act was his drinking and reasons that drinking is a lawful act as it cannot cause death or bodily harm to any individual other than the person doing the drinking. A careful reading of the words used by the judge, shows

that the drinking was not found to be unlawful, but reckless. It also evidenced a lack of capacity on the part of defendant to form a specific intent to kill. Thus, the reason why defendant was not found guilty of murder. What was unlawful was the striking of the deceased by the accused in such a manner that it could cause death or great bodily harm. If such an unlawful act is performed recklessly, an accused will be found guilty. People v. Hunter, 365 Ill. 618 (1937); People v. Ibom, 25 Ill.2d 585 (1962).

[10,11] Defendant finally contends that the people did not prove that he acted recklessly. A definition of the word "recklessly" appears in the Ill. Rev. Stat. 1963, Chap. 38, Par. 4-6:

> A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. An act performed recklessly is performed wantonly, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning.

Defendant contends that he was so intoxicated that he could not form a conscious disregard that a risk existed or that a result would follow. (Emphasis supplied). It is true that intoxication will destroy a specific intent to commit a crime. The state of mind of the reckless man, however, falls far short of the statutory definition of intent. Ill. Rev. Stat. 1963, Chap. 38, Par. 4-4 states:

> A person intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct.

It is readily seen that defendant's state of mind fell short of the necessary intent to kill, but did not fall short of the degree of consciousness necessary to disregard a risk that particular circumstances

exist or that a particular result would follow. Although the evidence shows he was drinking continuously, it did not show that he was so intoxicated that he was unconscious of the risk he was taking. There was sufficient evidence that defendant struck and beat deceased. Defendant's conscious striking of the deceased was an unlawful act and defendant's excessive drinking made it reckless. The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.

49373

56 I.A.2154(1)

RICHARD B. HANSEN, individually and d/b/a L. M. HANSEN AGENCY and HANSEN & HANSEN, a Partnership,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	MUNICIPAL COURT
v.	)	OF CHICAGO
ROBERT E. BRUNTON,	)	
Defendant-Appellant.	)	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment entered against the defendant, Robert E Brunton, in the Municipal Court of Chicago, in the amount of $899.86, and costs. The plaintiff, Richard B. Hansen, individually and d/b/a L. M. Hansen Agency and Hansen and Hansen, a partnership, initiated the suit for the recovery of certain insurance premiums on insurance policies allegedly ordered by defendant.

Three types of insurance policies are the subject matter of this case. The first involves a plate glass policy on a launderette leased to the defendant, the second involves Workmen's Compensation and Public Liability coverage on said launderette; and the third a health and life insurance policy covering the defendant and his family. The facts dealing with each type of insurance and solutions for the problems presented can be treated separately.

First, we will deal with the plate glass insurance. In February, 1953, the defendant, Robert E Brunton, took over the ownership of a launderette located in a store at 6920 South Wentworth Avenue Chicago, Illinois. He did not have a written lease and was a tenant on a month-to-month basis. The rent was paid to George W. Hansen, the father of the plaintiff, who had placed the title to the property in the LaSalle National Bank as Trustee under Trust No. 13278. On December 6, 1958, defendant was rendered a Statement #1034 on this property by the Leith M. Hansen Agency for plate glass insurance for a period of one year

starting January 20, 1959, in the amount of $41.72. The name of the insured and address on said policy was LaSalle National Bank, Trustee under Trust No. 13278, P.O. Box 135 South LaSalle Street. Leith M. Hansen, a general insurance broker, d/b/a Leith M. Hansen Agency with a business address at 6914 South Wentworth Avenue, Chicago, Illinois, was the wife of George W Hansen, the landlord, and the mother of Richard B. Hansen, plaintiff. She died on July 2, 1962.

Defendant contends that he never ordered this policy and bases this contention on the following facts: One, he never received the policy; two, being a tenant from month to month he had no insurable interest in said property and three, since the policy was issued to and named the LaSalle National Bank it was its premium to pay. [1-3] The fact that defendant never received the policy was explained by the testimony of plaintiff that the policies were kept in plaintiff's office for the benefit of defendant. Defendant's contention that he had no insurable interest as a tenant from month-to-month is also without merit. In the case of Fray v. National Fire Insurance Company of Hartford, 255 Ill. App. 209 (1929) affirmed in 341 Ill. 431, the issue was whether, in a land trust, the trustee or the beneficial owner has an insurable interest. The court held that the trustee alone has an insurable interest. That case, however, did not involve a tenant as in the instant situation. When a tenant is involved, the tenant like the trustee has an insurable interest in order to protect his leasehold estate, and defendant here recognized this by his actions in paying the premiums since 1953, apparently without protest. In answer to the defendant's third point, the fact that the policy was in the trustee's name was explained by testimony of the plaintiff that it is customary to name the fee simple title-holder as the owner of the policy.

Next we will deal with the Workmen's Compensation and Public Liability Insurance. Defendant ordered Workmen's Compensation and Public Liability Insurance in the amount of $101.25. Defendant contends that a request to cancel this policy was conveyed to plaintiff and his family, and that plaintiff informed him he would do so in two weeks, (the launderette operated until August 31, 1959 when a fire occurred and the business had closed permanently. It appears there was an understanding that it would take two weeks to dispose of the laundry bundles and therefore the insurance coverage should not be cancelled until all bundles had been distributed). Defendant admits he owes eight months of the premium due but denies he owes anything for the period after the alleged cancellation.

[4,5] At the outset we could dispose of this contention as de minimus. The trial court, however, heard testimony relevant to the alleged cancellation and ruled in favor of the plaintiff. The court reasoned that liability coverage was necessary because defendant was undecided on whether he would reopen the launderette. In a bench trial the determination of a trial judge, on the weight to be attached to testimony, will not be disturbed unless manifestly contrary to the weight of the evidence. Hall v. Illinois National Insurance Company, 34 Ill. App.2d 167 (1962).

The last policies to be considered are those that were underwritten by the Sun Life-Zurich Health and Life Insurance Companies. Defendant and his family were covered by the above insurance on October 24, 1960, when he received a statement from Hansen and Hansen and Associated Companies, 6914 Wentworth Avenue, Chicago, Illinois, covering premiums for the months of October, November, and December, 1960, totaling $181.50. Said statement emphasized that new rates were in effect for Sun Life starting with the month of October. Defendant

contends that he requested plaintiff and other members of his family to cancel these policies because of the raise in rates, and that on December 30, 1960, he mailed a letter of cancellation together with a check for $181.50, covering the premiums due to Hansen and Hansen and Associated Companies. There was evidence introduced that the check enclosed with the letter of cancellation was endorsed and put through plaintiff's bank account on December 31, 1960. There was also evidence that plaintiff in a letter to defendant dated September 28, 1962, listed the various policies and the outstanding premiums due on each by defendant but failed to list the Sun Life-Zurich Health and Life Insurance premiums. Plaintiff did not cancel the policies and later brought this action to collect the premiums due after the alleged cancellation date.

[6-8] Defendant's contention of cancellation is based on the principle that a properly mailed letter is prima facie evidence of delivery. Loving v. Allstate Insurance Company, 17 Ill. App.2d 230 (1958). This case and others, however, also enunciate the principle that a prima facie case can be overcome by the testimony of the parties and their witnesses. The trial court ruled in favor of plaintiff and we hold that ruling was not contrary to the manifest weight of the evidence and will not be overruled here.

In part four we deal with the question of whether or not plaintiff was the proper party to bring this action against defendant.

In a letter to defendant's attorney dated May 23, 1963, the Director of Insurance of the Department of Insurance for the State of Illinois certified that there was no record of an agency by the captioned name of Hansen and Hansen and Associated Companies licensed in any capacity by the Department. There was also evidence that the Leith M. Hansen Agency was never licensed in any capacity by the Department after her death on July 2, 1962.

[9] Defendant contends the glass, liability and workmen's compensation policies procured through the Leith M. Hansen Agency could not be sued upon by plaintiff, as Leith M. Hansen was not licensed at the time of the suit. There was, however, uncontradicted testimony by plaintiff that he had acquired the assets of the Leith M. Hansen Agency from his mother. Under §733 of the Insurance Code, Ill. Rev. Stat. (1963) §733 (4), a licensed company which acquires substantially all of the assets of an existing insurance company may initiate an action in law or equity. There was uncontradicted evidence that plaintiff was licensed and thus had a right to bring this action on those policies.

[10] Defendant's contention that the suits brought on the health and life insurance policies procured through Hansen and Hansen and Associated Companies were not brought by a proper party as said company was not licensed is likewise without merit. This organization was only the employer for the members of a voluntary group health and life insurance plan. The organization was not an agent and did not transact any insurance business in the State other than as an employer. It was not required to be licensed by the State of Illinois. Metropolitan Life Ins. Co. v. Quilty, 92 F.2d 829 (CCA 7th Cir. 1937). Plaintiff as plan administrator was a proper party to bring this action. The judgment of the lower court is affirmed.

JUDGMENT AFFIRMED

BURKE, P.J., and BRYANT, J., concur.

49658

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
ROBERT SHANNON,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION

MR. JUSTICE BRYANT delivered the opinion of the court:

This is an appeal from a conviction of murder entered in the Circuit Court of Cook County, Illinois, Criminal Division, January 3, 1964. The appellant was sentenced to the Illinois State Penitentiary for a term of not less than fourteen nor more than twenty-five years.

Appellant argues that the facts show he was not guilty of murder, but that he acted in self-defense. He also claims that if he is guilty of anything (which he insists he is not) it is manslaughter in that he acted under a sudden and intense passion resulting from the serious provocation by another.

The trial brought forth the following testimony:

Eunice Goggins testified she was with the appellant the night of June 21 and the early morning of June 22, 1963. She said she had known the appellant for approximately two years. She had a date with him that night and first saw him at the Blue Room, a tavern located on Roosevelt Road in Chicago. She testified he grabbed her by the collar. When she asked him what was the matter, he replied, "Don't say anything to me." Apparently the appellant was angry because he had not found Miss Goggins earlier in the evening.

Miss Goggins testified that she did not notice the appellant carrying a crutch at this time, but that they went from the Blue Room to the Pom Pom Lounge where, she says, the appellant got his crutch. From the Pom Pom Lounge, they went to the front of Miss Goggins' apartment where they fought when she saw in his pocket a picture of the appellant

and another woman. The witness testified the appellant struck her during this altercation. She then went upstairs to her room, leaving the appellant on the street.

Miss Goggins continued her testimony, stating that about five minutes later the appellant called her and asked her to meet him. She met him in front of her apartment and together they walked back to Roosevelt Road, a distance of about one block. She related that suddenly the appellant got very angry and began striking the ground with his crutch. After he stopped striking his crutch on the ground, he had a conversation with a young man standing over to one side. The witness testified she left the corner at this point and returned to her apartment. She heard the appellant tell his friend, Frazier, to catch her and he did catch up to her in front of her building.

On cross-examination, Miss Goggins said the appellant seemed to be carrying the crutch around with him rather than using it to support himself, but that she could not remember exactly. She said she did not go to the police until July 17, almost three weeks after the killing.

The next witness was Billy Earl Fuller. He testified he saw the appellant in front of a pool room on Roosevelt Road at about 1:15 in the morning. He said he saw the appellant argue with Miss Goggins and that he broke his crutch by hitting it on the sidewalk. At that time, he said, Miss Goggins left, and he saw the appellant walk to the corner to see if Frazier would catch her. Upon reaching the corner, the appellant fell. He said he saw the appellant pulling himself up by holding onto the building on the corner with one hand and a young man with the other. When he got up, according to this witness, he pushed the young man and then stabbed him. Fuller testified he never saw the young man, now known to him as the deceased, Samuel Lee Marshall, strike the appellant with the crutch or with anything else.

On cross-examination, Fuller said he did not stay until the police

arrived and did not talk to them until July 19. He said the precinct captain's wife asked him to tell the police what he saw and that she drove him to the police station on that day.

The next witness, Tim Robinson, said he saw the appellant on the corner with Miss Goggins and heard him use foul language to her. He said that when Miss Goggins left, everyone on the street ran to the corner to see if Frazier would catch her. When Shannon got to the corner, he fell and the crutch broke. The deceased, Marshall, was about eight feet behind the appellant when the latter fell. When the appellant pulled himself up he pushed and then stabbed Marshall, according to this witness.

On cross-examination, Robinson testified he did not say anything to the police until July 19. He further said he saw the appellant bang his crutch on the sidewalk and that it broke under him when he used it to go to the corner to see if Frazier would catch Miss Goggins. He said that when the appellant fell, the deceased was standing by him and the appellant began to swear at him. He heard the appellant say "What are you looking at?" He then pulled himself up and stabbed the deceased.

The other evidence in the People's case was the testimony of the first police officer on the scene, Edward Franczyk, to the effect that he found the body of the deceased and a broken crutch about seven feet away. Also introduced was the coronor's report and a toxologist's report stating that the deceased had alcohol in his system.

The defense brought on six witnesses who testified to the appellant's good reputation for being a peaceful and law-abiding citizen. Two of these witnesses were the appellant's brother and sister-in-law. Another witness said a person could have a good reputation for being peaceful and law-abiding after he had been charged with murder.

The appellant's brother, David Shannon, testified that on the date

of the killing, the appellant lived with him and his wife. He said that on that date the appellant had shortly been out of the hospital where he had had an operation performed on his knee. He testified the appellant used crutches to walk -- two crutches at first, and one crutch a little later. He had a crutch when he went out of the house to meet Miss Goggins. The appellant got home at 1:50 the next morning; he did not have a crutch with him.

Earl Frazier testified he had known the appellant for some months and that at the time of the killing he was using a crutch to walk. He met the appellant that evening as he was calling Miss Goggins after they had their argument, and went with him to her home. As the three of them were walking back to Roosevelt Road a man came up to the appellant and asked him for some money. When the appellant would not give him any, the man followed him to the corner. He then went to the decedent, Marshall, and told him something, which the witness did not hear. Frazier then testified that Marshall called the appellant a "crippled name." He said that Marshall was "crowding" the appellant and that the appellant was trying to get away from him.

This witness continued, saying that Marshall grabbed the appellant's crutch and struck him. The appellant fell and then got up telling the witness to chase after Miss Goggins who was going back to her apartment. The witness says he ran after Miss Goggins and told her to go home. He then went back to the corner where the appellant was "pulling up somewhere about Marshall." He says that he saw the appellant strike Marshall with a knife and that Marshall fell.

On cross-examination Frazier testified he left home that morning, and that he had been drinking, but he could not say how much he had consumed that day. He said he could not remember if the deceased struck the appellant in an overhand motion, sideways or underhand. He said he was gone from the corner about one minute when he went to chase Miss

Goggins. He does not remember what he did after the knifing occurred.

The appellant then took the stand in his own behalf. He said he had been working in construction but that he had not worked since the preceding February. He testified he had a crutch with him the date of the occurrence.

According to the appellant, when he first saw Miss Goggins that evening, he did not grab her by the collar, but merely put his arm around her. He says they had an argument later in the evening and that immediately after calling her to ask her to come back down to the street, he met Frazier. His story of the man on the street asking for money closely parallels with Frazier's account of the incident. He says the man who asked for money, whose name he does not know, went to the deceased, Marshall, and said something to him. Marshall then swore at the appellant, according to this testimony.

The appellant says Marshall grabbed his crutch and struck him with it. He testified he fell after the first blow, and that the crutch broke with the first blow. The appellant testified the deceased said, "When I stop, you won't get up." He said he was afraid of being killed, and that out of fear, he stabbed Marshall. At the time he returned home, according to the appellant, his head was bleeding from a blow or blows received in his beating by the deceased.

On cross-examination the appellant testified he was not drunk that evening, but had had two or three beers. He said that after the beating, he was bleeding from his forehead and that there was blood on his face. This closed the defense's case.

The People put on three witnesses in rebuttal. One of these, Edward Francyzk, who had testified before, gave a description of the corner on which the stabbing occurred which indicates that witness Frazier could not have seen the stabbing as he claims he did. Apparently the

stabbing took place around the corner from the street Frazier was on when he was coming back from chasing Miss Goggins.

Finally, the police detective, William Kreidich, testified that he was one of the officers who arrested the appellant, and that the appellant said on his arrest that the deceased had struck him only once with the crutch.

After hearing this evidence, the Court found the appellant guilty of murder. The question we must answer is whether the evidence is sufficient to support such a finding.

The appellant points out that at the date of the stabbing he was recently out of the hospital following surgery on his knee. He points out that it would be unlikely that he would go out looking for trouble in his condition. It is also pointed out that none of the People's occurrence witnesses went to the police soon after the crime, but waited about three weeks until the precinct captain's wife talked them into going. The appellant seems to indicate that these people made up this story in the intervening period of time. He has offered no reason for their doing so.

The People, on the other hand, say that the appellant is not telling the truth and that the only "eye-witness" who agrees with his story, Earl Frazier, was in fact not in a position to see what happened at all. This is what was indicated by Officer Franczyk the second time he testified. While this testimony is not conclusive, it raises a question as to whether witness Frazier actually did see the incident. We also note that Frazier's testimony was somewhat vague at many points. Certainly the People's strongest point is that the morning after the killing a police officer examined the appellant and saw no signs of a beating. If, as the appellant claims, the deceased grabbed his crutch and began to beat him, striking him on the head one or more times and

several times on the trunk of his body, it is inconceivable that there would be no cuts or bruises. The appellant claims he was struck so hard the crutch broke. This crutch was built to carry the weight of a heavy man, and would not break unless an extremely strong blow were struck with it. Such a blow would have to leave its marks on the appellant.

We also notice that appellant said on cross-examination he was bleeding heavily. Yet neither his brother nor sister-in-law said that he was bleeding when he came home immediately after the stabbing. It is clear, therefore, that the finding of guilty is supported by competent evidence to establish defendant's guilt beyond a reasonable doubt. There were two conflicting stories told, and the court could believe the People's witnesses and not those for the defense.

It also seems clear that the offense committed constituted murder and not manslaughter. While it does seem that the appellant did not plan this killing, this incident clearly falls within the Supreme Court's statement in People v. Slaughter, 29 Ill.2d 384, 389, 194 N.E.2d 193.

> "It is not necessary, to justify a conviction of murder, that the party charged may have brooded over the intent to kill or that he entertained it for any considerable length of time, but it is sufficient if, at the instant of the assault, he intended to kill the person assaulted, or it will be enough if he is actuated in making the assault by that wanton and reckless disregard of human life which denotes malice."

Under the circumstances of this case, the appellant could claim he should have been convicted of manslaughter only if he had been the one attacked. Here, the Court found on strong, competent evidence that the appellant was the attacker. As we will not reverse the Court below on that point, we can see no basis for reducing the offense from murder to manslaughter.

In the circumstances of this case, however, we have considered carefully the sentence given and believe it should be reduced from 14 to 25 years to 14 to 16 years in accordance with Ill. Rev. Stat. Ch. 38, Sec. 121-9. The judgment of the Circuit Court as modified is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and LYONS, J., concur.

115

56 I.A.2175

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 10595 Agenda No. 4

Louisiana Farm Supply Company, Plaintiff-Appellant, vs. James Carroll, Defendant-Appellee.	Appeal from Circuit Court Pike County

CRAVEN, J.

Plaintiff brought an action in a justice of the peace court in Pike County to collect the balance allegedly owing of $69.85 on an open account. A judgment for the defendant was appealed to the Circuit Court. After a trial de novo in the Circuit Court without a jury, judgment was again entered for the defendant.

This appeal is from that judgment.

The record discloses that the defendant purchased a combine and a corn head attachment from the plaintiff in 1959. The purchase was by a conditional sales contract and involved a down payment and the execution of certain promissory notes payable to John Deere Company. The notes were delivered by the plaintiff to the John Deere Company "with a reserve account recourse." By the terms of the contract between the plaintiff and the John Deere Company, plaintiff was to repossess the equipment in the event of a default and the indebtedness owing John Deere Company would be deducted from plaintiff's reserve account balance.

In 1960 the defendant purchased certain repair parts for the combine from the plaintiff. These purchases were financed by a note to the plaintiff, upon the execution of which the plaintiff opened an account for the defendant with a beginning credit balance equal to the amount of the note. Ultimately the various credits and

debits to this account resulted in a balance of $69.85 owed by the defendant to the plaintiff.

In June of 1961, on default of the conditional sales agreement, the plaintiff advised the defendant of its intention to repossess the combine and corn head pursuant to instructions from John Deere Company. One J. L. Clark, representing himself as an employee of John Deere Company, came to the defendant's home to repossess the machinery. Defendant refused possession to Clark and asked for additional time to pay the indebtedness to John Deere Company. This refusal to deliver the machinery resulted in a telephone conversation between Clark and the defendant's then attorney. The attorney advised Clark that in the absence of the defendant's being relieved of the possibility of any deficiency judgment, the defendant would refuse delivery of the machinery and "take bankruptcy."

After that conversation, the defendant consented to surrender the machinery and signed a bill of sale to John Deere Company.

The defendant admits the various purchases from the plaintiff but contends that the repossession of the machinery left him "free and clear" of his indebtedness both to John Deere Company and the plaintiff. We cannot agree.

All of the evidence in this case indicates that there were two separate and distinct transactions. The first involved the purchase of the machinery as outlined. The other was the purchase of various repair parts from the plaintiff on an open account. The evidence is uncontroverted that Clark was an employee of John Deere Company and rather clearly indicates that Clark participated in the repossession of the machinery. In negotiating for possession, he made certain representations on behalf of his principal, John Deere Company. These representations were in no way related to nor concerned with the indebtedness of the defendant to the plaintiff.

The contention of the defendant that there was an accord and satisfaction is not sustained by the evidence. The record is barren of any evidence that Clark was an agent of the plaintiff authorized to forgive the

indebtedness. The law does not recognize a presumption of agency. On the contrary, agency must be proved, and the burden is on the person who asserts its existence to prove it and to show the authority of the agent. Webb v. Commercial Credit Corporation, 24 Ill. App. 2d 75; 163 N.E. 2d 727.

While a judgment of the trial court, sitting without a jury, is entitled to great weight, if it appears on review that there is no evidence in the record to sustain the judgment, it becomes the duty of this court to reverse. Johnson v. Spinhirne, 2 Ill. App. 2d 189; Majewski v. Majewski, 328 Ill. App. 194.

In this case there is no controversy but that the defendant made the purchases from the plaintiff. There is no controversy as to the accuracy of the account. The only defense against a judgment for the plaintiff rested on the assertion that the indebtedness was negotiated away by Clark at the time of the repossession

of the equipment, and for the reasons stated, this defense, on examination, becomes an empty assertion.

Thus, all barriers to a judgment for the plaintiff fall. The judgment of the Circuit Court of Pike County is reversed and judgment will be entered here for the plaintiff in the amount of $69.85 and costs.

Reversed and judgment entered for the plaintiff.

Smith, P.J., and Trapp, J., concur.

49464

LOTTIE ZAGAR,
Plaintiff-Appellant,
v.
BRUNO ZAGAR,
Defendant,
and
NATHAN GOMBERG,
Intervenor-Appellee.

56 I.A.2175

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This appeal is taken from an order entered on September 17, 1963, granting judgment for the intervenor against plaintiff in the amount of $2,085 for services rendered, said amount found to be due and owing to intervenor under a contract of employment entered into with plaintiff.

Plaintiff received a Decree of Separate Maintenance in this action on January 8, 1957, whereby she was to receive from defendant the sum of $40 per week as support. Defendant failed to comply with the payment provisions of the decree, and on November 17, 1959, plaintiff retained intervenor to collect the amount of the arrears then owing to her. The contract of employment established intervenor's fee as an amount equal to one-half of the arrears collected from defendant. Both parties agree that the contract covers only those arrears due and payable as of November 17, 1959. By court action, intervenor established said arrears at $4,359, with which amount plaintiff is in accord. From the inception of his employment until January, 1963, intervenor performed numerous legal services on behalf of plaintiff. During this period defendant paid some $414 on the arrears in question, $210 to plaintiff and $204 to intervenor. In January of 1963, plaintiff filed a petition to have intervenor dismissed as her attorney, without

prejudice to his rights under the contract of employment. Intervenor then filed a petition to establish his fees owing under the contract, requesting that "an order be entered ordering the plaintiff to pay to (intervenor) the sum of $2,179.50, being 50% of the fees agreed to by contract of arrears heretofore established in the sum of $4,359.00." Intervenor's petition also contained a schedule of services rendered by him on behalf of plaintiff during the period in question.

The matter was referred to a master, who found that the contract of employment set intervenor's fees at one-half of the arrears found to be due from defendant at the time when the contract was entered into; that the amount of said arrears was $4,359; that intervenor expended the sum of $109.50 as costs in the course of enforcing the collection of the arrears; and that the plaintiff offered no evidence in support of her petition to have intervenor dismissed. The master recommended that plaintiff's petition be dismissed; that an order be entered allowing intervenor the sum of $2,179.50 as and for attorney's fees and the sum of $109.50 for costs; that plaintiff is entitled to a credit of $204 received by intervenor from defendant on account of said arrears; and that an order be entered in the balance amount of $2,085 for intervenor, said order to be a lien on all monies received by plaintiff from defendant. The master also submitted his certificate of services, fees and charges in the amount of $150.

The order of the court appealed from entered judgment in favor of intervenor against plaintiff in the amount of $2,085 and recited that execution issue thereon, to be levied only against one-half of the proceeds of the collection of arrears due from defendant. The order further recited that all monies to be paid to plaintiff on said arrears are attached and that said monies shall be paid to intervenor until his lien of $2,085 has been satisfied, provided that, as such

payments are made, one-half shall be distributed to intervenor and one-half to plaintiff; and that plaintiff should pay the sum of $150 to the master in accordance with his certificate of services, fees and charges.

The only question presented for consideration is whether the contract of employment gives intervenor the right to recover at this time a judgment on monies owing by defendant on the entire amount of the arrears found to be due as of the date of the employment contract, or only on that amount which was in fact paid on the arrears. Intervenor admits that only $414 has been paid by defendant on the arrears in question, $210 to plaintiff and $204 to intervenor. He further states in his brief that he is seeking to recover only fifty per cent of the money paid to plaintiff by defendant. Intervenor also admits that the payment of $414 by defendant on the arrears leaves a balance due thereon of $3,945, "on which, if collected, intervenor claims a lien for half." Under the circumstances, it was error for the court to enter judgment for intervenor for other than one-half of the amount actually paid by defendant on the arrears.

The decree is reversed without prejudice to intervenor's right to recover based on the amount actually collected on the arrears in support money under the contract of employment, the costs advanced by him in enforcing the collection of the arrears in the amount of $109.50, and to contend, and plaintiff to resist the claim, that he (intervenor) is entitled to recover the reasonable value of the services rendered by him on behalf of plaintiff in matters outside of his contract to collect the arrears. The award to the master of $150 is not disturbed.

DECREE REVERSED WITHOUT PREJUDICE AS TO CERTAIN RIGHTS.

BRYANT, J., and LYONS, J., concur.

49932

56 I.A.2 254

PETER VANDER BLOEGH, d/b/a MONARCH PLUMBING COMPANY,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	
v.	)	MUNICIPAL COURT
JERRY SEIDA, d/b/a SKYLAND BUILDERS,	)	
Defendant-Appellant.	)	OF CHICAGO.

MR. JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an order denying motion by defendant to vacate a "judgment on the pleadings" entered on April 21, 1964, and to vacate the order of court holding defendant in default for failure to file his appearance.

Defendant was served with a summons which directed him to appear on March 27, 1964, or to file an appearance on or before that date. This he failed to do. On April 8th defendant sent to plaintiff's attorney notice of a motion to vacate the default, in which notice he requested that his motion be heard on April 16th.

On April 21st plaintiff moved for judgment on the pleadings which was allowed. Defendant's motion to vacate was heard and denied on the same day. On May 14th defendant's attorney filed a petition to vacate the judgment of April 21st alleging that one of the attorneys for defendant appeared in the branch court in Chicago Heights on April 16th and was informed by the clerk of the court that the case had been transferred to the Blue Island branch; that when the attorney arrived in Blue Island, he was told by the clerk of that branch that the civil call was completed but that defendant's motion would be entered, the default vacated and the cause set for trial. However, no orders in this case appeared in the court record for that date.

The petition also alleged that plaintiff's attorney admitted receiving the notice of April 8th but that he did not appear in court in response thereto. No answer was filed to the petition and plaintiff has not appeared in this court.

The record shows that on April 30th a default was entered. This was after defendant had filed his motion to vacate a default which he erroneously assumed had been entered prior to April 8th.

After a hearing on June 2nd, the court ordered the record corrected to show a default on March 30th in lieu of April 30th and denied the petition to vacate the judgment of April 21st. No reason was given for correcting the record and it nowhere appears that any default had actually been entered on March 30th. The court did not enter a proper nunc pro tunc order correcting the date of the default. In Sherman v. Green et al., 152 Ill. App. 166, the court said at page 168:

> A nunc pro tunc order is valid only when made to supply an omission to enter of record an order really made, but omitted from the record by the clerk. Lindauer v. Pease, 192 Ill. 456, 459. When, by expiration of the term or lapse of time, the court has lost jurisdiction such order should show, and thus preserve in the record, the basis or ground of the jurisdiction for making the particular nunc pro tunc order. McKay v. People, 145 Ill. App. 277.

See also Nupnau v. Hink, 53 Ill. App. 2d 81, 84.

The judgment in this case was erroneous because there was no default of record at the time the judgment was entered.

The order of June 2, 1964, and the judgment order of April 21, 1964, are reversed and set aside and the cause is remanded with directions to vacate the default of defendant, to permit him to answer and to proceed to trial on the merits.*

REVERSED AND REMANDED WITH DIRECTIONS.

McCormick, P.J., and English, J., concur.

Publish abstract only.

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* The record does not disclose if filing fees were paid by defendant; if not, this order is conditioned on their payment.

(491)

FILED

APR 8 1965

Clerk Appellate Court Second District

No. 64-35

(56 I.A.2491)

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Abstract

Northmoor Estates, Inc., a corporation, Appellant, vs. Board of Education of School District No. 108, Appellee	Appeal from the Circuit Court of Lake County

CARROLL - J.

The plaintiff, Northmoor Estates, Inc., owned land in Highland Park, Illinois. The Board of Education of School District No. 108 (hereinafter referred to as the school) desired to purchase part of this land as a site for a school building. The agreement between the parties provided that Northmoor would sell 4.847 acres to the school for the sum of $61,046.61 and that the school would participate in the cost of the sewer construction for the land purchased and also for adjoining land owned by the plaintiff to the extent of 10% of the total sewer construction costs. This 10% amounted to $14,351.44. Northmoor, having planned to subdivide the land adjacent to that sold to the school, promised to pay the school $250.00 per lot, as each lot was sold or built upon.

It is alleged in the complaint that the school failed to pay its share of the sewer construction costs amounting to the sum of $14,351.44 and plaintiff prays judgment in that amount.

No. 64-35

IN THE

SUPREME COURT OF [illegible]

[illegible]

Northmoor Estates, Inc., [illegible],

Plaintiff,

vs.

Board of Supervisors of School
District No. 113,

Defendant.

PAGE 12 - 3.

The plaintiff, Northmoor Estates, Inc., [illegible] in Block
Land Park, Illinois. The Board of Supervisors of School District
103 (hereinafter referred to as the Board) [illegible] to purchase such
of this land as a site for a school built. [illegible]
the purpose proposed [illegible] 3,317 acres of the
school for the use of [illegible] in the [illegible]
in the case of the sewer connection for the [illegible]
for acquiring land owned by the plaintiff [illegible]
total sewer connection costs. [illegible]
Northmoor, having planned to subdivide the [illegible]
to the school, proceeded to pay the [illegible]
lot was sold or built upon.

It is alleged in the complaint that the value [illegible]
of $21,321.44 was placed upon land [illegible]
pay for the sewer connection would be the [illegible]

In its answer, the school alleged that the parties "agreed to settle their mutual claims against each other by the defendant waiving its claim of $250.00 upon the sale of each of said lots in consideration of plaintiff's releasing the defendant of its obligation to pay its share of the cost of the installation of said sanitary sewer; that the plaintiff did assume and satisfy the obligation of the defendant for its share of the cost of said sewer in the amount of $14,351.44 and the defendant has not heretofore sought or demanded payment of the said $250.00 for the sale of said lot; . . ."

The school also filed a counter-claim alleging that Northmoor breached its contract with the school by failing to pay the school the sum of $250.00 per lot when said lots were sold and demanding judgment on the counter-claim for $23,250.00.

The case was tried by the court and resulted in a judgment against the plaintiff on the complaint and against the defendant on the counter-claim. From this judgment the plaintiff, Northmoor Estates, Inc., has appealed.

The plaintiff here urges that its agreement to pay the school the sum of $250.00 per lot as the lots were sold was severable from the other agreements between the parties; that its agreement to release the School District from its obligation to pay $14,351.44, as its share of the sewer construction was obtained through business duress and further that it violated the Statute of Frauds; also that Northmoor's agreement to pay the School District the sum of $250.00 per lot was illegal and against public policy, and therefore, should not be enforced.

Charles Podolsky was President of the plaintiff corporation. He, along with other persons, owned a tract of vacant land in the City of Highland Park. In February of 1960, the plaintiff corporation purchased this land from the individual owners. Manilow Con-

struction Company owned tracts of land to the north and to the south of the plaintiff's land which it intended to subdivide. On January 4, 1960, a tentative agreement was reached between Manilow and Northmoor for a joint venture to construct storm and sanitary trunk sewers to serve their respective proposed subdivisions.

Samuel Lawton and Samuel Chaimson, both attorneys, were members of the Board of Education of the School District. Starting February 15, 1960, Lawton and Chaimson, on behalf of the school, entered into negotiations with Podolsky for the purchase of a 5 acre tract of land, which was part of Northmoor Estates.

On November 1, 1960, Lawton and Chaimson met with Podolsky. Podolsky testified that at such meeting a price for the sale of the land was agreed upon. Chaimson's testimony as to this meeting was that when he and Lawton walked into Podolsky's office, Podolsky handed them a sheet of paper and said, "Here is my proposal in connection with the purchase of the property that we are talking about. I want you to look at it. This is my final offer; take it or leave it. This is the package deal that I want to transpire." Podolsky's testimony as to this paper was that he did not recall the typewritten slip and that if he had it prepared before Chaimson and Lawton came in, it would have been on his stationery. This paper was admitted into evidence and reads as follows:

"Proposal to School District From Northmoor Estates, Inc.

1. School District will allow easement for trunk sanitary and storm sewers thru their property, as designed by H. B. Bleck Engineering, preliminary drawings enclosed.

2. School District will pay for all off site improvements. Costs on the approximate basis of 44 acres for Northmoor Estates, 37 acres for Manilow Construction Co.and 10 acres for the School District. Actual areas to be determined by the Engineers.

3. Manilow Construction Company, the School District and Northmoor Estates will pay individually the cost of any on site improvements for the trunk lines for sanitary and storm sewers which are installed on their respective properties, in accordance with the attached engineering plans.

4. An additional agreement is being drafted with reference to the $250.00 per home site which the builders will contribute to the school which will be agreed to at the same time as this agreement."

At a meeting on November 1, 1960, the School Board voted to pay Northmoor $12,594.72 per acre for the land. By its letter dated November 7, 1960, Northmoor Estates informed the City Plan Commission of Highland Park that a tentative agreement had been arrived at with the School Board as to its acquisition of the land, sharing of cost of utilities and a voluntary contribution by Northmoor Estates for homes constructed. On January 12, 1961, by telephone, Podolsky and Lawton agreed that the total price for the land the School District wanted to buy (which according to surveys was 4.847 acres) would amount to $61,046.61, and that an easement would be reserved through the tract for the construction of the sewer. It was also agreed that the School Board would participate in the off site sewer construction cost, and confirm that phase of the agreement by a letter to Podolsky. On January 17, 1961, the School Board voted to purchase the property for $61,046.61.

Podolsky testified to a telephone conversation between himself and Lawton. According to his testimony, Lawton requested that Podolsky send a letter to the School Board relative to the $250.00 per lot payment and Lawton stated that the school building would be finished sometime in 1962.

The minutes of the School Board's meeting of April 18, 1961 showed that there was an "agreement reached on the drainage of the Clavey site which would cost the Board of Education $17,500.00 or 10% of the total cost."

Podolsky further testified that in May of 1961 he had a heart attack and put Unit No. 2 of Northmoor Estates on the market for sale. On August 24, 1961 Podolsky entered into an agreement for the sale of all of Northmoor Estates, Unit 2, to one Harold Friedman, subject to the completion of the sewer and also subject to an approval of a plat of the subdivision by the City of Highland Park.

An escrow account was established for the sewer project. On August 28, 1961, Lawton deposited in this account $14,000.00 for the school. On the following day Lawton was informed by a member of the Highland Park Plan Commission that Friedman was buying the property from Northmoor and would pay no "donations" of any kind to the School Board. Lawton immediately instructed the escrowee to withhold distribution of the sewer escrow funds pending further instructions. Lawton telephoned Podolsky that same day and Podolsky confirmed that Northmoor Unit No. 2 was to be sold to Friedman, subject to final completion of the sewer project and plat approval within 90 days. Lawton then told Podolsky that he would hold Northmoor to the payment of $250.00 per lot since Friedman had refused to pay it.

Podolsky testified that on September 12, 1961, he appeared before the Highland Park Plan Commission with a plat of Unit No. 2 and that the Plan Commission gave final approval, "subject to my straightening out with the School Board." The minutes of that meeting of the Plan Commission show that the plat "be granted tentative approval and final approval, subject to the placement of a ten foot public way leading to the park and school between any two lots along Hastings Avenue, and if said public way cannot possibly be placed

without forcing a lot or lots below the minimum frontage or total area, a variation will be recommended." There is no indication in the Plan Commission's minutes of the meeting of September 12, 1961, that the approval of the plat was subject to Podolsky's "straightening out" with the School Board.

The school introduced into evidence a document which was a City of Highland Park Plan Commission "Application for plat approval". On this form is a "check list for approving final plats". One of the items appearing on the check list is: "Are the following submitted with the final plat" and one of its sub-sections is: "Reference of plat to School District". The majority of the items on such list are checked. The trial court, at the urging of Northmoor's attorney, noted that there appeared to be a straight line, which had been erased, opposite the "Reference of plat to School District" item.

On October 5, 1961, Podolsky called Lawton and an agreement was reached between the two that the School Board withdraw the $14,000.00, which they had deposited in the sewer escrow, and drop their demand for $23,000.00. On October 9, 1961, the School Board withdrew its $14,000.00 deposit from the sewer escrow account. The Plan Commission approval of Podolsky's subdivision is dated October 9, 1961, the same day as the School District made its withdrawal from the sewer escrow account.

The principal and controlling issue in this case is whether the plaintiff's agreement to pay the School Board the sum of $250.00 per lot as the plaintiff sold or built on the lots was voluntary or whether the plaintiff entered into this agreement under duress and compulsion.

compaction.

Upon the plaintiff's application for injunction, the court ordered the defendant to show cause why the injunction should not be granted. The defendant's answer admitted the allegations of the complaint but denied that the plaintiff was entitled to the relief demanded. The defendant's answer also contained a counterclaim for damages in the amount of $25,000.00, which the defendant claimed it had suffered as a result of the plaintiff's alleged wrongful conduct.

On February 3, 1983, the parties entered into a written stipulation which had been entered into by the parties' attorneys, which provided that the plaintiff would withdraw its motion for injunction and the defendant would withdraw its counterclaim. The stipulation was approved by the court on February 3, 1983, and the action was dismissed with prejudice.

On February 3, 1983, the plaintiff filed a motion to vacate the dismissal and reinstate the action. The motion was based on the ground that the stipulation had been entered into by the plaintiff's attorney without the plaintiff's knowledge or consent. The plaintiff's attorney had failed to communicate with the plaintiff regarding the settlement negotiations and had failed to inform the plaintiff of the terms of the stipulation before it was entered into. The plaintiff's attorney had also failed to obtain the plaintiff's approval of the stipulation before it was entered into.

The motion was supported by the affidavit of the plaintiff's attorney, who stated that he had not communicated with the plaintiff regarding the settlement negotiations and had not obtained the plaintiff's approval of the stipulation before it was entered into. The attorney also stated that he had not informed the plaintiff of the terms of the stipulation before it was entered into.

The motion was opposed by the defendant's attorney, who stated that the plaintiff had been fully informed of the settlement negotiations and had approved the stipulation before it was entered into. The defendant's attorney also stated that the plaintiff had been fully informed of the terms of the stipulation before it was entered into.

The motion was heard by the court on March 15, 1983, and was denied without prejudice. The court found that the plaintiff had been fully informed of the settlement negotiations and had approved the stipulation before it was entered into. The court also found that the plaintiff had been fully informed of the terms of the stipulation before it was entered into.

The plaintiff's attorney then filed a motion to withdraw as counsel for the plaintiff. The motion was granted without opposition. The plaintiff's attorney then filed a motion to withdraw as counsel for the plaintiff. The motion was granted without opposition.

Plaintiff, in arguing that its agreement to pay $250.00 per lot is illegal and void relies primarily on two cases: Rosen v. Village of Downers Grove, 19 Ill. 2d 448, and Pioneer Trust and Savings Bank v. Mount Prospect, 22 Ill. 2d 375.

The plaintiffs in the Rosen case were Herman Rosen and Firestone Realty, each of whom owned real estate in the Village of Downers Grove, which they proposed to subdivide. An ordinance of that Village required subdividers to dedicate land for educational facilities but also provided that if the Plan Commission should deem that the dedication of such land would not of itself meet the reasonable requirements of providing educational facilities for the proposed subdivision then the Plan Commission might require any additional means for providing reasonable facilities. Acting under this ordinance the municipality attempted to require subdividers to pay a certain sum per lot for educational purposes. The enabling Statute for the Village Ordinance was Article 53 of the Revised Cities and Villages Act which authorized municipalities to establish Plan Commissions with authority to recommend to the corporate authorities adoption of an official plan. The Act provides that the plan may include reasonable requirements for playgrounds, schoolgrounds, and other public grounds, etc. The Act further provides that no plat of a subdivision "should be entitled to record or shall be valid unless the subject subdivision shown thereon provides for streets, alleys . . . and public grounds in conformity with the applicable requirements of the official plan," Ill. Rev. Stat. 1957, Chapter 24, pars. 53-2, 53-3. Rosen, who owned two lots that he wished to re-subdivide into 4 lots, presented a plat of the subdivision to the municipality's Plan Commission. The plat was approved subject to Rosen's obtaining a certificate of compliance from the Boards of

Education of the elementary and high school districts in which the property was located. Rosen requested the City Council to approve his plat without requiring a certificate from the Boards of Education. The Council refused. Firestone owned a tract of vacant land which he proposed to subdivide into 52 lots. He also was required to secure a certificate of compliance from the Boards of Education. A certificate was issued to him after he agreed to pay the School District the sum of $325.00 for each lot as it was sold. The Circuit Court held that the Village Subdivision Control Ordinance was invalid and enjoined the Village officers from enforcing it. The court also enjoined the City Council from requiring certificates of compliance from the Boards of Education as a prerequisite to approval of a plat of the subdivisions and further enjoined attempts to require financial contributions as a prerequisite to approval of the plats. The Supreme Court in affirming the Circuit Court's decree as to the validity of the ordinance held as follows: (1) That the provisions of the Cities and Villages Act with respect to reasonable requirements for public streets, school grounds, etc. appear to be based on the theory that developers of subdivisions may be required to assume costs which are specifically and uniquely attributable to their activity and which would otherwise be cast upon the public. (2) However, that municipalities cannot use the withholding of a plat approval to solve all the problems that a community can foresee and that the record in this case showed that the Boards of Education arrived at a figure of $325.00 per lot by taking into account factors totally unrelated to the proposed subdivisions. (3) The Act does not authorize money charges in lieu of dedication of land. (4) That the Ordinance is broader than the enabling Statute in that the Ordinance refers to dedications for "educational purposes," while the Act refers to "reasonable requirements for . . . school grounds". And further

Education of the elementary and high school districts in which the property was located. Rosen requested the City Council to approve his plat without requiring a certificate from the Boards of Education. The Council refused. Firestone owned a tract of vacant land which he proposed to subdivide into 12 lots. He also was required to secure a certificate of compliance from the Boards of Education. A certificate was issued to him after he agreed to pay the School District the sum of $125.00 for each lot as it was sold. The Circuit Court held that the Village Subdivision Control Ordinance was invalid and enjoined the Village officers from enforcing it. The court also enjoined the City Council from requiring certificates of compliance from the Boards of Education as a prerequisite to approval of a plat of the subdivisions and from requiring subdividers to require financial contributions as a prerequisite to approval of the plats. The Supreme Court in affirming the Circuit Court's decree as to the validity of the ordinance held as follows: (1) That the provisions of the Cities and Villages Act with respect to reasonable requirements for public streets, school grounds, etc. appears to be based on the theory that developers of subdivisions may be required to assume costs which are specifically and uniquely attributable to their activity and which would otherwise be cast upon the public. (2) However, that municipalities cannot use the withholding of a plat approval to solve all the problems that a community can foresee and that the record in this case shows that the Boards of Education arrived at a figure of $125.00 per lot by taking into account factors totally unrelated to the proposed subdivisions. (3) The Act does not authorize money charges in lieu of dedication of land. (4) That the Ordinance is broader than the enabling Statute in that the Ordinance refers to dedications for "educational purposes," while the Act refers to "reasonable requirements for . . . school grounds". And further

that the ordinance fixes no standards as to the amount of land that shall be dedicated. The Supreme Court also found that Firestone was a subdivider of raw land upon a large scale and was under contractual obligations to furnish building sites to contractors and that the payments he made to the school districts upon sales of lots were made under duress and compulsion. The decision in the Rosen case hinges on two propositions. Firstly, that the Village of Downers Grove Subdivision Control Ordinance went beyond the allowable limits of the enabling Statute. Secondly, that the payments by Firestone to the School Districts were made under duress and compulsion.

In Pioneer Trust & Savings Bank v. Mount Prospect, (supra) a similar municipal ordinance was involved. It provided that before a plat of a subdivision may be approved, that property be dedicated for public uses, including public schools, the amount of land being dedicated to be based on the number of residential building sites or family living units. The ordinance did not involve any cash payments in lieu of dedication for public use. The Supreme Court affirmed the decision of the Circuit Court holding the ordinance invalid. It held that an ordinance may be valid only if it requires the developer of a subdivision to assume those costs which are specifically and uniquely attributable to his activity and which would otherwise be cast upon the public. There being no showing in the record that the need for recreational and educational facilities was thus attributable to the addition of the subdivision, the ordinance was invalid.

The Rosen and Pioneer cases deal with the invalidity of municipal ordinances which require either the dedication of land for public uses, or cash payments in lieu thereof, when the burden cast upon subdividers is not specifically and uniquely attributable to their activity. In Rosen it was additionally held that under

that the ordinance fixes no exact area as to the amount of land that shall be dedicated. The Superior Court also found that Pinecrest was a subdivider of raw land upon a large scale and was under contractual obligations to furnish building sites to contractors and that the payments be made to the school districts on sales of sites were made under duress [illegible]. The decision in the [illegible] case hinges on two propositions. [illegible], that the Village of [illegible] Grove subdivision ordinance would require the [illegible] of the enabling statutes. Secondly, that the [illegible] to the school districts were [illegible].

In [illegible] [illegible] a similar municipal ordinance [illegible] that the a plat of a subdivision may be approved, [illegible] be dedicated for public uses, including public schools, [illegible] land [illegible] dedicated to be based on the number of residential units [illegible] family living units. The ordinance [illegible] in lieu of dedication for public use. [illegible] Court affirmed the decision of the [illegible] Court [illegible] the ordinance [illegible]. It held that an ordinance [illegible] the developer of a subdivision [illegible] needs uniquely attributable to [illegible] upon the public. [illegible] used for recreational and educational facilities [illegible] attributable to the activities of the subdivision, the ordinance was valid.

The cases [illegible] municipal ordinances which require [illegible] land for public uses, or cash payments in lieu thereof, [illegible] the burden cast upon subdividers is not specifically and uniquely attributable to their activity. In [illegible] it was additionally held that under

the facts the payment by the subdivider to the School District was not voluntary.

More in point than the cases cited by plaintiff is Board of Education v. Herzog Construction Co., 29 Ill. App. 2d 138. There the plaintiff, Board of Education, entered into an agreement with the defendant, Herzog Construction Co., by which plaintiff promised to locate and build a school within a subdivision being developed by the defendant. The defendant agreed to help defray the cost of erecting the proposed building by paying the school district the sum of $95,000.00. The trial court allowed plaintiff's motion to strike the defendant's answer and entered judgment on the pleadings in favor of the plaintiff for $97,955.53. The defendant appealed from the order overruling his motion to strike the complaint and from the judgment. The defendant's theory, on appeal, was that its agreement to pay money to the school district to help defray the cost of erecting the proposed building was void as against public policy in that it was a contract "for the purchase of influence upon the action of public officers." The Appellate Court held that this charge was without foundation and stated:

> "The defendant voluntarily agreed to pay the $95,000.00 toward the construction of the building, as it realized that the proposed school building was essential to its sales program. Having accepted the benefits of the agreement, it is now attempting to renege on its voluntary agreement to contribute money to the school board. It will not be permitted to do so.
>
> The case of Rosen v. The Village of Downers Grove, 19 Ill. 2d 448, 456, 167 N.E. 2d 230, supports the plaintiff in its contention that the Board of Education is authorized to enter into voluntary agreements with subdividers to accept payments to help defray the cost of erecting school buildings."

The distinguishing factor between the instant case and Rosen and Pioneer is that here there is no ordinance involved requiring the

subdividers to make dedications of land, or to pay money in lieu thereof. Neither Rosen or Pioneer are authority for the proposition that subdividers are prohibited from making voluntary payments to school districts to help erect school buildings. Acceptance of the same by Boards of Education was approved in the Herzog case. Accordingly it cannot be said that plaintiff's agreement with defendant was in itself void as against public policy. If, however, as in the Rosen case, it is shown that the builders agreement to make payments to the school district was made under economic pressure amounting to duress, then the agreement might be void for that reason.

In support of its contention that plaintiff's agreement to make payments of $250.00 for each lot sold was obtained under duress, the plaintiff points to the following: (1) That at the time Podolsky was negotiating with Lawton he informed Lawton that his health was not good. (2) Plaintiff, in its brief, states that it had almost one-half million dollars tied up in the land for several years and that Lawton knew that Podolsky was in no condition to embark on a building project to get his money out and that the sale to Friedman had to go through and further that Lawton knew that approval of the plat of the subdivision was a condition of the sale to Friedman. (3) Lawton was a member of the Plan Commission while a member of the School Board. (4) That the Plan Commission, as a matter of procedure, refers all Plat applications to the affected School Board. (5) That the "settlement" between the School Board and the plaintiff and the approval of the Plat were made the same day. (6) That when the Plat received tentative approval, Podolsky was told that it was subject to his "straightening out" with the School Board. (7) The erasure on the Plan Commission check list of referral to the School District.

subdividers to make contributions of land, or to pay money in lieu thereof. Neither [illegible] or [illegible] are authority for the proposition that subdividers are prohibited from making voluntary payments to school districts to help erect school buildings. Acceptance of the same by Boards of Education was approved in the [illegible] case.

Accordingly it cannot be said that plaintiff's agreement with defendant was illegal [illegible] as against public policy. [illegible] as in the [illegible] case. [illegible] that the [illegible] agreement to make payments to the school [illegible] voluntary payments amounting to [illegible], when the aggregate amount [illegible] the first year [illegible]

In support of its contention that [illegible] to make payments of [illegible] the plaintiff points to the following: (1) That [illegible] was negotiating with Lawton [illegible] not good. (2) Plaintiff, in its brief, [illegible] one-half million [illegible] that Lawton may that [illegible] building project to get [illegible] had to go through and further [illegible] plat of the subdivision was a condition of the sale [illegible] (3) Lawton was a member of the Plan Commission [illegible] of the School Board. (4) That the Plan Commission, [illegible] procedure, refers all Plat applications to the affected School Board. (5) That the "settlement" between the School Board [illegible] and the approval of the Plat were made the same day. (6) That [illegible] the Plat received tentative approval, [illegible] subject to his "straightening out" with the School Board. (7) The [illegible] on the Plan Commission [illegible] of [illegible] to the School District.

The evidence shows that although Lawton was a member of the Plan Commission as well as the School Board, that he did not talk to anyone on the Plan Commission or the Director of Planning or anybody on the City Council about the Plat approval. There is no evidence in the record that the School District ever indicated, to the Plan Commission, or anyone else, any approval or disapproval of the Plat or made any recommendations with reference thereto. Likewise we find no reference in the abstract of record to the evidence which it is claimed supports plaintiff's contention that Lawton knew that approval of the subdivision Plat was a condition of the sale to Friedman.

The judgment order of the Circuit Court contains a finding that "the contribution agreement by the plaintiff with the defendant and the settlement agreement were voluntary and legal." Thus it is apparent that the trial Court was not persuaded by the evidence that the compromise agreement was obtained by duress. Since we are of the opinion that such finding was not against the manifest weight of the evidence, we will not disturb the same. Wintersteen v. National Cooperage Woodenware Co., 361 Ill. 95.

Plaintiff also argues that its agreement to pay $250.00 per lot was severable and divisible from any other agreements between the parties and that since this particular agreement was void as being against public policy, a settlement based on such an illegal contract is void and may be disregarded. Since we are of the opinion that plaintiff's per lot payment agreement was not illegal and void, it is of no moment whether that part of the agreement was divisible from the other agreements of the parties. (It is our further opinion, however, that it was the intention of the parties to enter into a

"package deal" and that the agreement of the plaintiff to pay $250.00 per lot to the School District was not severable.)

Plaintiff also urges that the settlement agreement was void because it violates the Statute of Frauds. It is suggested that plaintiff's agreement to pay $250.00 per lot was not capable of performance within one year and that since it was for an interest in real estate and within the purview of Section 2 of the Statute of Frauds the subsequent agreement (which was oral) should have been evidenced by a writing in order to be within the Statute. (Ill. Rev. Stat. 1963, Ch. 59). Such contention is without merit. The agreement was evidenced by a writing which was received in evidence. This writing was a letter dated March 29, 1961, from Northmoor Estates, Inc. to the school, which stated that the plaintiff would pay the school $250.00 per lot "when the deal is consummated or $250.00 if a house is constructed on a lot and when the house is completed and the deal is closed." Such letter is a sufficient writing or memorandum of the agreement to take it out of the Statute of Frauds. Plaintiff correctly states that a written contract within the Statute of Frauds cannot be modified by an oral executory agreement, citing 37 C.J.S. Statute of Frauds, Section 232. This particular Section, after stating the above rule, also recites that a fully performed oral modification is binding. The settlement agreement according to plaintiff's brief, was that "Northmoor could settle the claim for $23,000.00 (representing $250.00 per lot for each lot sold) without putting up any additional cash by merely permitting the School Board to withdraw its $14,000.00 from the escrow." Plaintiff then goes on to state that "such a settlement was made and the school withdrew its $14,000.00 from the sewer account." It thus appears, that plaintiff concedes that the settlement agreement was fully executed by

the School Board's withdrawal of $14,000.00. The oral settlement agreement was therefore not within the Statute of Frauds.

Plaintiff's remaining argument is that the settlement agreement between the parties is invalid because it was not supported by a consideration. Since it appears that such agreement was voluntary and not void as against public policy, the school had a valid claim against the plaintiff for payments made pursuant to such agreement. Settlement of such claim was sufficient consideration for the compromise agreement between the parties. Good v. Krause, 215 Ill. App. 333.

For the reasons herein indicated the decree of the Circuit Court of Lake County is affirmed.

Affirmed

Abrahamson, P.J. and Moran, J. Concur

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